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The court is likely to wish to hand down its judgment in an approved final form. Counsel should therefore submit any list of typing corrections and other obvious errors in writing (Nil returns are required) to the relevant judge's clerk, by fax to 0171 936 6250, by 12 noon on Tuesday, 18 April 2000 so that changes can be incorporated, if the judge accepts them, in the handed down judgment.

Case No: CH 1999/0176/3

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CHANCERY DIVISION
MR JUSTICE LIGHTMAN

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 April 2000

Before:

THE RIGHT HONOURABLE THE VICE-CHANCELLOR
LORD JUSTICE CHADWICK
and
LORD JUSTICE BUXTON

<u>KHAWAJA MOHAMMAD NAEEM</u>	<u>Appellant</u>
- and -	
<u>BANK OF CREDIT AND COMMERCE</u>	<u>Respondent</u>
<u>INTERNATIONAL S.A.</u>	

Mr Robin Allen QC and Mr Isaac Jacob (instructed by Messrs Beale & Co for the
Appellant)

Mr Christopher Jeans QC and Mr D Stilitz (instructed by Messrs Lovells for the
Respondent)

DRAFT JUDGMENT

The Vice-Chancellor:-

1. Two claimants gave notice of appeal against the order of Lightman J of 30 June 1998. They were Mr Khawaja Mohammad Naeem and Mr Abdul Naim Mohammad. We were told that since then, Mr Mohammad has agreed terms of settlement with BCCI. Mr Naeem is now, therefore, the sole appellant. But the issues raised on this appeal do not depend to any significant, extent, if at all, on facts peculiar to Mr Naeem's case. They are issues which affect the cases of every BCCI ex-employee who, like Mr Naeem and Mr Mohammad, signed an ACAS COT3 form and thereby purported to accept the terms that BCCI were offering -

“... in full and final settlement of all or any claims whether under, Statute, Common Law or in Equity of whatever nature that exist or may exist and, in particular, all or any claims rights or applications of whatsoever nature that the [ex-employee] has or may have or has made or could make in or to the Industrial Tribunal, except the [ex-employee's] rights under [BCCI's] pension scheme”.

2. The question for decision is whether Mr Naeem, who signed a COT3 form on 4 July 1990, thereby barred himself from subsequently bringing a “stigma” claim against BCCI. In *Malik -v- BCCI [1998] AC20* the House of Lords, reversing a unanimous Court of Appeal who had dismissed an appeal from Mr Justice Evans-Lombe, held that breach of contract “stigma” claims by ex-employees of BCCI could, if the requisite facts could be proved, succeed.

3. It is accepted that, at the time Mr Naeem signed the COT3 agreement, he did not know that he could bring a breach of contract “stigma” claim against BCCI. It is to be assumed, for present purposes, that he was unaware of the Bank's illegal and dishonest conduct of its banking business; conduct that led to its collapse in the summer of 1991 and that, as the House of Lords held, may have constituted a breach by BCCI of the contractual obligation of trust and confidence that it owed to its employees.

4. The main argument for Mr Naeem, presented very clearly by his counsel, Mr Robin Allen Q.C., is that since Mr Naeem did not know that he had a “stigma” claim, the COT3 agreement should not be construed so as to release that claim. There is, however, also a

subsidiary argument. The illegal and dishonest nature of the business being carried on by BCCI, which is the foundation stone of the "stigma" claim, was something of which Mr Naeem was unaware but, obviously, was known to BCCI through the medium of one or more of its corrupt officers. Since BCCI did not, at the time the COT3 agreement was signed, make any disclosure to Mr Naeem of the facts, known to itself but not to Mr Naeem, giving rise to the 'stigma' claim, the COT3 agreement cannot be enforced against Mr Naeem, at least so far as the release of the stigma claim is concerned.

5. These two arguments are, or at least ought to be, distinct from one another. The first raises an issue of construction. The principles of construction of written documents should be applied to resolve it. The second argument involves a principle of equity. Should a beneficiary of a general release, who at the time of the release knows of some claim that the releasor can make against him but of which, to his knowledge, the releasor is ignorant, be permitted to rely on the general release in order to prevent that claim being made? In *Taylor Fashions Ltd -v- Liverpool Trustees Ltd [1982] QB 133* Oliver J. was considering whether, in order to establish an estoppel by acquiescence, each and every one of the five "probanda" set out by Fry J. in *Willmott -v- Barber (1880) 15 Ch.D. 96* had to be shown to be present. He rejected that rigid approach. He concluded that:-

"... principle requires a very much broader approach which is directed at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment". (p. 151/152)

and that:-

"The inquiry which I have to make therefore, as it seems to me, is simply whether, in all the circumstances of this case, it was unconscionable for the defendants to seek to take advantage of the mistake which, at the material time, everybody shared ...".

Oliver J. was, of course, dealing with a very different type of case, but the question is whether a comparable approach is applicable here. If the court can be satisfied that the beneficiary of the general release, BCCI, is taking an unconscionable advantage of the releasor's ignorance of the

6. The two arguments should, as I have said, be distinct from one another. In some of the cases, however, in which the scope of a general release has been in question, the construction point has become intertwined with the equity point so as to produce what might appear to be a principle of equitable construction applicable to a general release. It is desirable, in my opinion, to try and unravel the threads in order to identify the principles that should be applied in the present case.

7. Let me start with the construction point. There is no doubt but that the language of the release in the COT3 agreement would, read literally, bar any and every claim by the releasor against BCCI. There is equally no doubt but that the language cannot be given so wide a construction as that. For example, some of the ex-employees who signed COT3 forms had banking accounts with BCCI that were then in credit. No-one has suggested, or could suggest, that by signing the COT3 form the releasor was barring himself from claiming the repayment of his money. BCCI's liquidators have accepted proofs from and paid dividends in the liquidation to a number of ex-employees who signed COT3 forms, and rightly so. A further example relates to claims against BCCI arising out of facts occurring after the COT3 agreements were signed. No-one has suggested that claims of that sort would be barred by the breadth of the language of the COT3 release.

8. The literal meaning of the words of a release, like that of any other document, may be restricted, expanded or altered so as to produce a meaning that corresponds to the intentions of the parties. Their intentions must, consistently with general principles of construction established in such cases as *Prenn -v- Simmonds* [1971] 1WLR 1381 and *ICS Ltd -v- West Bromwich Building Society* [1998] 1WLR 896, be ascertained objectively. Lord Hoffmann in the latter case said, at p. 923 that:-

“Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract”.

and that:-

“... the law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective interest”.

9. The principle expressed by Lord Hoffmann are as applicable to the construction of a release as to that of any other document. There may, however, be a distinction to be drawn between a general release which is unilateral, with the releasor receiving no quid pro quo for the release, and a general release which forms part of a bargain between the releasor and the beneficiary.

10. A unilateral general release, which would have to be by deed in order to bind the releasor, has, so far as the approach to construction is concerned, much in common with a Will. It is sometimes said, in relation to construction of Wills, that a Will speaks as from the testator's armchair. That is simply a graphic way of saying that a Will must be construed by reference to the state of knowledge of the testator at the time he makes it. The same, in my judgment, applies to a unilateral general release. The words used in the general release must be construed by reference to the state of knowledge of the releasor at the time of the release. I find it almost inconceivable that a unilateral general release would ever be construed so as to bar a claim based on facts of which the releasor was unaware. How could it have been his intention to release such a claim?

11. But where the general release is part of a bargain between the releasor and the beneficiary, the state of knowledge of the releasor, although always relevant, cannot be necessarily conclusive. The construction of the release must accord not with the intentions of the releasor alone, but with the joint intentions of the parties. The releasor's lack of knowledge of the facts giving rise to a claim may not be shared by the beneficiary of the release. And even if the beneficiary does share the releasor's ignorance of the facts, the beneficiary may positively intend that the release shall cover any and every claim whether or not based on facts then known. The law cannot possibly decline to allow parties to contract that all and any claims, whether or not known, shall be released. The question in a case such as the present is to ascertain, objectively, whether that was the parties' intention or whether, in order to correspond with their intentions, a restriction, and if so what restriction, should be placed on the scope of the release.

12. Let me now turn to the cases. In *Turner -v- Turner (1880) 14 Ch.D 829* beneficiaries in a deceased's estate gave the executrix a general release. The release was expressed to "release and forever discharge [the executrix] ... and the estate and effects of the [deceased] ... of and from all and all manner of actions, ... claims and demands whatsoever ...". It could not have been couched in wider or more general terms. Subsequently the executrix discovered that an asset of the deceased had during his life been sold at an undervalue. She brought an action to have the sale set aside and recovered a large sum of money as part of the deceased's estate. Vice-Chancellor Malins held that the beneficiaries' claim to share in this windfall was not barred by the general release. He said this at p. 834:-

"In a case of this kind it is the duty of the court to construe the instrument according to the knowledge of the parties at the time, and accordingly to what they intended and not to extend it to property which was not intended to be comprised within it ... [It] is clear that the deed was only intended to apply to property the existence of which they were then aware of. I quite agree with the assertion ... that ... if the deed is to be read literally ... it is quite clear that this suit is barred by that release. But it has always been the rule of this court to construe releases and documents of that kind with regard to the intention of the parties, and to refer in such cases to the state of the property which was known at the time".

13. Vice-Chancellor Malins then referred to *Lindo -v- Lindo 1 Beav. 496* and said:-

"... it was decided by Lord Langdale that the words of the release must be read to refer to the state of knowledge which the parties had, and according to the intention which they had when they executed the deed".

14. The release in *Turner -v- Turner* was not a unilateral release. It was part of a compromise between the executrix and the beneficiaries. But the intentions of the parties, objectively ascertained from the content of the deed of release itself and the surrounding circumstances, showed that the release was not intended to extend to assets of the estate of which nobody was at the time aware. The scope of the release was restricted accordingly.

15. In re *Perkins [1898] 2 Ch. 182* was a case that, like *Turner -v- Turner*, applied normal principles of construction in order to limit the breadth of a general release contained in a

commercial agreement. Sir Nathaniel Lindley M.R., giving the judgment of the court, said at p. 190:-

“General words of release are always controlled by the recitals and context which show that, unless the general words are restricted, the object and purpose of the document in which they occur must necessarily be frustrated. General words are always construed so as to give effect to, and not so as to destroy, the express intentions of those who use them”.

16. The two cases in which the issues were closest to those in the present case are *Ecclesiastical Commissioners for England -v- North Eastern Railway Co. (1877) 4 Ch.D. 845* and *Lyall -v- Edwards (1861) 6 H&N 337*. In *Ecclesiastical Commissioners England -v- North Eastern Railway Co* the scope of a general release was limited by reference to the state of knowledge of the releasor at the time of the release. The plaintiffs and the defendant company owned adjoining coal mines. There was a dispute as to the location of the correct boundary between the two mines. This boundary dispute was settled by the publication of a new agreed map in 1862. After a lengthy correspondence between the parties a written settlement agreement dated 11 May 1864 was signed. This agreement ended with a general release in the following terms:-

“It is mutually agreed by and between the undersigned parties hereto, that in consideration of the above all claims on account of damage of every kind, and whether by trespass or otherwise by either party, be condoned and discharged from the signing of this agreement”.

17. Unknown to the plaintiffs, the defendant company, from some date in 1863, had been extracting large quantities of their coal. The plaintiffs did not discover what had been going on until 1870. They commenced an action for an account of the coal that had been taken and damages for trespass. Among other defences the defendant company relied on the general release in the written agreement of 11 May 1864. Most of the judgment of Malins V-C is directed to the defendant company's Statute of Limitations defence but all the defences, including the defence based on the general release, were rejected. The Vice-Chancellor, at p. 853, made it clear that, if the plaintiffs had known prior to 11 May 1864 that the defendant company had been working the plaintiffs' coal, the action could not have been maintained. A feature of the facts of the case not

mentioned in the judgment was that the plaintiffs' ignorance of the defendant company's unlawful extraction of their coal was an ignorance of which the defendant company must have been aware.

18. In *Lyall -v- Edwards (1861) 6 H&N337* the plaintiffs brought an action for trover of indigo warrants. The defence was that the plaintiffs had released the defendants from the causes of action. The release relied on was a release "from all and all manner of actions ... claims and demands whatsoever both at law and in equity, or otherwise howsoever". The plaintiffs' reply said that when the release was executed:-

"... they did not ... know that the defendants had committed the grievances in the declaration mentioned ...: that the defendants did then know that they had committed the said grievances and that the plaintiffs had a claim or cause of action against them in respect of the said goods but did not inform the plaintiffs thereof before the execution of the said [release] ...".

19. The court held that the reply was good. The defendants were not entitled to rely on the general release. Pollock C.B. said this, at p. 347:-

"It is a principle long sanctioned in courts of equity, that a release cannot apply, or be intended to apply, to circumstances of which a party had no knowledge at the time he executed it, and that if it is so general in its terms as to include matters never contemplated, the party will be entitled to relief".

The "principle" was expressed as an equitable principle applicable to releases. But, where a general release is one of the terms of a contract between two parties, the fact that one of the parties had no knowledge of relevant circumstances can hardly by itself be a ground either for limiting the scope of the release as a matter of construction or for equitable relief. Otherwise it would be impossible for parties to contract to release all claims whether or not known. Why should rules of construction or equity place such a fetter on contractual ability? As it was put by counsel for the defendants, Mr Montague Smith:-

"... the ground of relief is not the mistake of material facts alone, but the unconscientious advantage taken of the party by the concealment of them".

20. Martin B agreed with Pollock C.B. He said that:-

“... a court of equity will intervene and confine [a release] to that which was in the contemplation of the parties at the time it was executed”.

This principle, as expressed by Martin B, seems to me to be no more than a commonplace rule of construction. Provided that what had been in the contemplation of the parties was objectively ascertained, any court construing the release would so confine it.

21. The third member of the court, Wilde B., said that:-

The doctrine of a court of equity is, that a release shall not be construed as applying to something of which the party executing it was ignorant and we now have to act on that doctrine in a court of law”.

The “doctrine”, as expressed, sounds like a rule of equitable construction applicable to releases.

22. In my judgment, there are no such things as rules of equitable construction of documents. And there are no rules of construction that are peculiar to releases. There are rules of construction that are applicable to all documents. Under these rules the court must try and ascertain the intentions of the party in question, if the document is unilateral, or of the parties, if more than one person is party to it, and, in the light of those intentions, objectively ascertained, determine the meaning that should be attributed to the words used in the document. Principles of equity have, in my opinion, nothing to do with the process of construction.

23. The role of equity can be no more than, in certain circumstances, to intervene where it would be unconscionable to allow one of the parties to rely on the strict legal construction of the document. An example where this might happen would be where one of the parties had consistently represented to the other that the document had a particular effect, inconsistent with the strict construction, and the latter had relied on that representation. The *Taylor Fashions Ltd* case raised considerations of that character. I have already cited passages from the judgment of Oliver J. in which he indicated the approach he thought the court should follow. In the event, on the facts of the case, Oliver J concluded that the plaintiffs had not discharged the burden on them

of showing that the defendants' reliance on the strict legal position was "dishonest or unconscionable" (p. 157).

24. Rectification is another example. If a party can show that the strict construction of a document was contrary to the intentions of the parties the court can, on the application of one of the parties, rectify the document so as to bring it into line with the parties' intentions. But formal rectification is not always necessary. The court can simply decline to enforce the document in a manner that is inconsistent with the parties' intentions. The court can take this course not only where the document is inconsistent with the parties' common intentions, but also where the document is inconsistent with the intentions of one party and the other party knew that to be so but did nothing to correct the misapprehension. The principle is expressed in Snell's Equity (30th Ed.) at paragraph 43.13 as follows:-

"... if one party to a transaction knows that the instrument contains a mistake in his favour but does nothing to correct it, he ... will be precluded from resisting rectification on the ground that the mistake is unilateral and not common".

and was applied by Pennycuik J in *A. Roberts & Co Ltd -v- Leicestershire County Council* [1961] Ch. 555 and by this court in *Thomas Bates and Son Ltd -v- Wyndham's (Lingerie) Ltd* [1981] 1WLR R.505.

25. The approach of the court in *Lyall -v- Edwards* illustrates, in my opinion, another member of the same family. The court will not allow a general release to be enforced so as to bar a claim of which the releasor had been unaware if so to enforce it would in all the circumstances be unconscionable. The "doctrine of a court of equity" referred to by Wilde B, the "principle long sanctioned in courts of equity" referred to by Pollock C.B., comes, in my judgment, to no more and no less than that.

26. It follows that, in the present case, the circumstances in which the COT3 agreement was signed are of critical importance. They are fully set out by Lord Justice Chadwick in his judgment, which I have had the advantage of reading in advance, and I need not repeat them. In short, BCCI had warned its employees of pending redundancies; discussions had taken place

between BCCI and the Banking Insurance and Finance Union (BIFU) about the terms that would be offered to its departing employees; on 18 June 1990 a redundancy notice terminating Mr Naeem's employment as from 30 June 1990 was sent to him by BCCI; the notice period was shorter than that to which Mr Naeem was entitled; the redundancy package sent to Mr Naeem specified the sums he would be paid if he signed the COT3 agreement; and on 4 July 1990, following interviews with ACAS conciliation officers, Mr Naeem signed the COT3 agreement. Under the COT3 agreement Mr Naeem received statutory redundancy pay of £1,380, an ex gratia payment of £2,559.24 (representing 4 weeks salary), £3,199.05 in lieu of the 5 weeks notice to which he was entitled and, in addition, £2,772.50 described as "Additional payment upon signing ACAS form COT3". It may be said that the £2,772.50 was Mr Naeem's reward for providing BCCI with the release.

27. Mr Jeans Q.C., counsel for BCCI, has accepted that the COT3 release cannot be construed so as to give effect to its literal meaning. He has accepted, for example, that employees who were depositors could bring claims relating to their deposits. The background circumstances justify, he accepted, limiting the COT3 release to a release of claims arising out of or connected with the employment relationship between the parties. The proposed limitation would still bar Mr Naeem's 'stigma claim' which is, unquestionably, a claim arising out of the employment relationship between the parties. But Mr Jeans submitted that no further limitation on the scope of the COT3 release was justified. The parties' intentions, objectively ascertained, were that all claims arising out of the employment relationship, whether or not arising out of facts known to the parties or to one of the parties, were to be barred. There could have been no other sensible reason for formulating the release in such wide, comprehensive terms.

28. Mr Jeans' submissions were forceful and persuasive, but I am not satisfied that they were right. Mr Naeem was unaware of BCCI's illegal and dishonest conduct of its business. That, for present purposes, is accepted. BCCI, on the other hand, was aware, through one or other of its dishonest officers, of the nature of the business it was carrying on. I do not suppose that BCCI knew, any more than Mr Naeem, or anyone else until the House of Lords handed down its judgment on 12 June 1997, that some of its employees might have a "stigma" claim against it, but it must be taken to have known the underlying facts. And it must also be taken to have known

that Mr Naeem was unaware of those facts. All of these circumstances form part of the background in the context of which the parties' intentions must be objectively ascertained.

29. If, at the time the COT3 agreement was signed both BCCI and Mr Naeem had known about the facts underlying the 'stigma' claim, it would, in my judgment, be clear that the COT3 release barred that claim. If, in relation to some other contractual claim, neither Mr Naeem nor BCCI had been aware of the facts, it might well be that the COT3 release would bar the claim. It must be possible for parties effectively to contract for the release of all and any claims, whether based on known facts or unknown facts. But that is not a possibility in the present case. BCCI knew what sort of business it was carrying on. Mr Naeem, it is to be assumed, did not. So this is a case where the facts giving rise to the claim were known to the beneficiary of the release but not to the releasor and where the beneficiary must have known of the releasor's ignorance. Against this background, why should the court impute to the parties' an intention that the COT3 release should bar the claim? Do the rules of construction require the court to do so? I do not think they do. The release from all claims for trespass in *Ecclesiastical Commissioners for England -v- North Eastern Railway* did not release the defendants from trespass claims of which the releasor was unaware but of which the defendants knew. An intention to release those trespass claims could not be imputed to the parties in the circumstances of that case. Similarly, the release from all claims in *Lyall -v- Edwards* did not bar the trover claims that the plaintiffs did not know they had but that the defendants did know the plaintiffs had.

30. In a case such as the present, in which Mr Naeem was unaware of the facts but BCCI was aware of them and was aware of Mr Naeem's ignorance, a conclusion on construction which attributed to the parties an objectively ascertained intention that the COT3 release should bar the 'stigma' claim would reward dishonesty at the expense of the innocent. The only honest intention that BCCI could have had in the circumstances of this case would have been an intention that left the stigma claim outside the scope of the COT3 release.

31. It is convenient at this point to turn to the disclosure issue. If BCCI had disclosed the relevant facts to Mr Naeem before the COT3 release had been signed, that disclosure would have formed part of the factual matrix in the context of which the parties' intentions would have had to

be objectively assessed. In that event, as I have already said, the only possible conclusion would have been that the COT3 release barred the stigma claim.

32. But BCCI had no obligation of disclosure. The debate in the present case has, in my opinion, been bedevilled by an unnecessary discussion as to whether or not BCCI had any duty to disclose to Mr Naeem the facts regarding its illegal and dishonest conduct of the banking business. The well-known case of *Bell -v- Lever Bros [1932] AC161* and the vexed issue of unilateral mistake have been thrown into the debate. The question whether any misrepresentation by BCCI as to its solvency or viability had been made to employees inducing them to enter into the COT3 agreements was discussed. On all of these points Lightman J. found against the employees. I would accept his conclusions on all these points. But, in my judgment, these are red herrings. None, in my judgment, is relevant to the real point at issue. The real point at issue is whether, there having been no disclosure, the COT3 release bars the contractual "stigma" claim. I have expressed the conclusion that, in the present case, the intention of the parties, objectively ascertained, was not an intention that the COT3 release should bar a contractual claim based on BCCI's corrupt and dishonest conduct of its business of which Mr Naeem, the releasor, as BCCI must have known, had no knowledge. But suppose that is wrong. Let it be supposed that the right conclusion on the construction point is that all contractual claims, including the stigma claim, were barred by the COT3 release.

33. In that case BCCI would have succeeded in obtaining an unconscionable advantage from Mr Naeem's ignorance of the relevant facts, and equity, in my judgment, will intervene. It would, it seems to me, be plainly unconscionable to allow BCCI to take advantage of Mr Naeem's ignorance, an ignorance of which BCCI must have been aware, and to rely on the COT3 release as a defence to the 'stigma' claim. *Lyall -v- Edwards* is authority for holding that equity will not allow that advantage to be taken. In *Taylor Fashions Ltd -v- Liverpool Trustees Ltd* Oliver J expressed the broad principle of equity within which the *Lyall -v- Edwards* decision, in my opinion, falls. This conclusion has nothing at all to do with duties of disclosure, unilateral mistake, *Bell -v- Lever Bros* or misrepresentation. It has everything to do with Mr Naeem's ignorance of the facts (if that be the case), BCCI's knowledge of them, BCCI's knowledge of Mr

Naeem's ignorance and any other circumstances bearing upon the conscionability of BCCI's reliance on the release as a defence to the "stigma" claim.

34. I would allow this appeal on the ground that the COT3 agreement, properly construed on the assumed facts and in the context of the parties' knowledge at the time it was signed, does not bar Mr Naeem's stigma claim. If I am wrong about that I would allow the appeal on the alternative ground that, on the assumed facts, it would be unconscionable for BCCI to rely on the release in order to bar the claim. In my judgment, if Mr Naeem has a viable "stigma" claim, the claim is not barred by the COT3 release.

Chadwick LJ:

35. Bank of Credit and Commerce International S.A. ("BCCI") collapsed in the summer of 1991. On 5 July 1991 it was ordered that BCCI be wound up by the High Court. Joint liquidators were appointed. Subsequently it became known that BCCI had, for some years past, carried on its business in a corrupt and dishonest manner. A number of former employees submitted proofs of debt in the winding up. Some of those proofs of debt included claims in respect of what have become known as "stigma" damages; that is to say claims for loss arising out of the damage to the employment prospects of the employee in the financial services industry by reason of his or her past association with BCCI. The basis of those claims was the breach (or alleged breach) by BCCI of an implied term in the contract of employment that it would not abuse the trust and confidence which an employee is entitled to place in the employer in relation to the honest conduct by the employer of its business. The proofs were rejected by the joint liquidators in May 1993; and their decision to reject was upheld by Mr Justice Evans-Lombe (in February 1994) and by the Court of Appeal (in March 1995). But the legal basis for the claims was recognised in principle by the House of Lords in *Malik v BCCI*, *Mahmud v BCCI* [1998] AC 20 - a decision handed down on 12 June 1997.

36. In the course of the winding up BCCI, acting by its joint liquidators, has commenced proceedings against many of its former employees to recover monies alleged to be due as banking debts or under loan agreements. In some cases the loans were secured by mortgages on domestic property; and in those cases the proceedings included claims for possession. Many of the

proceedings against former employees were commenced in the Chancery Division of the High Court; but others were commenced in the Queen's Bench Division or in County Courts up and down the country. In many of those actions the former employees have raised cross-claims in respect of "stigma" damages.

37. In due course Mr Justice Lightman was appointed as the assigned judge to exercise case management functions in relation to the litigation between BCCI and its former employees. By an order made on 11 December 1997 he transferred all actions not already in the Chancery Division to that Division; and stayed all actions then pending in (or by virtue of that order transferred to) the Chancery Division, subject to directions calculated to identify common issues suitable for trial in test cases. One of the issues identified has become known as "the compromise ('ACAS COT-3') issue". On 29 July 1998 Mr Justice Lightman ordered that that issue should be tried in the proceedings (CH 1998 B 463) brought by BCCI against Khawaja Mohammad Naeem ("Mr Naeem") for recovery of an alleged debt. Subsequently he was joined as a test claimant by Abdul Naim Mohammad ("Mr Mohammad"), the defendant to proceedings (CL 531955) commenced by BCCI in the Central London County Court.

38. The ACAS COT-3 issue arises in these circumstances. In the summer of 1990, a year before the collapse of BCCI, a number of those employed in the London Office were dismissed on grounds of redundancy. They were invited to sign a form of release in consideration of monies paid to them on the termination of their employment. Many did so. The release was typed, at the instance of BCCI, on an ACAS form COT3. It was in these terms:

"The Applicant agrees to accept the terms set out in the documents attached in full and final settlement of all or any claims whether under statute, Common Law or in Equity of whatsoever nature that exist or may exist and, in particular, all or any claims rights or applications of whatsoever nature that the Applicant has or may have or has made or could make in or to the Industrial Tribunal, except the Applicant's rights under the Respondent's pension scheme."

39. In that context, as appears on the face of the COT3 form, "the Applicant" means the ex-employee and "the Respondent" means BCCI. The issue, stated shortly, is whether the release, in those terms, bars those who signed it from asserting a stigma damages claim against BCCI.

40. In accordance with directions given by Mr Justice Lightman on 30 June 1998, a statement of claim in relation to the ACAS COT-3 issue was served, on 4 September 1998, on behalf of Mr Naeem and Mr Mohammad; and a defence to that pleading was served, on 18 September 1998, on behalf of BCCI, acting through its joint liquidators. The trial of the issue was heard by Mr Justice Lightman, with oral evidence, at the beginning of December 1998. He delivered a written judgment on 18 December 1998. He decided the issue against Mr Naeem and Mr Mohammad and, accordingly, dismissed their claims for the declarations set out in the statement of claim of 4 September 1998. He made declarations in the following terms:

- “1. The Agreements (“the Agreements”) contained in the COT 3 Forms signed by Mr Khawaja Mohammad Naeem and Mr Abdul Naim Mohammad (“the Employees”) are valid and binding upon the Employees. The Agreements preclude the Employees’ claims and counterclaims for damages for breach of contract and misrepresentation.
2. The terms of the Agreements preclude all claims against the Plaintiff (including cross-claims whether contractual, tortious or otherwise, save for claims under the Plaintiff’s pension scheme.”

41. Mr Naeem and Mr Mohammad obtained permission from this court (Lord Justice Mummery) to appeal against Mr Justice Lightman's order of 18 December 1998. It is that appeal that has come before us. We were informed at the outset of the hearing that, since service of the notice of appeal, Mr Mohammad has agreed terms of compromise with the joint liquidators. He has not pursued his appeal; accordingly, we indicated that we would dismiss it. In form we are concerned only with the appeal of Mr Naeem. But it is relevant to have in mind that Mr Justice Lightman directed, at paragraph 6 of his order of 29 July 1998, that any determinations or findings of law - or as to facts which are common to cases not before the court as test cases - shall be binding on the parties to all the actions under case management by virtue of his earlier order of 11 December 1997. The outcome of this appeal, therefore, binds persons other than the nominal appellant, Mr Naeem.

42. The events leading up to the signing of the ACAS COT3 form by Mr Naeem – and the other former employees who signed COT3 forms at or about the same time – are set out by the judge at paragraph 3 of his written judgment. He described the history as “largely undisputed”;

and no challenge to his findings in that respect has been made on this appeal. It is convenient, therefore, to adopt his account; which (in so far as it relates to Mr Naeem and with some minor textual modification) I set out below:

- (i) On 30 April 1990, Mr Naqvi, the Chief Executive Officer of BCCI informed Mr Chowdry, the General Manager, that the Government of Abu Dhabi had acquired a 77% shareholding in the group of which BCCI formed part and that BCCI needed "visibly to control and cut down its operating costs and become leaner and stronger".
- (ii) On 7 May 1990, the Banking and Insurance Union ("BIFU") wrote to BCCI seeking information about the rumours of a closure programme.
- (iii) On 9 May 1990, and again on 11 May 1999, Mr Abbas, the BCCI officer in charge of personnel matters, sent memoranda to staff about plans to relocate the Central Support Organisation ("CSO") to Abu Dhabi and restructure at branch office and regional levels. There was a warning of a number of redundancies and volunteers for redundancies and staff comments were invited. It was emphasised the BCCI was not in a position to make any firm commitment about continuation of employment as no decision had yet been made about the future size of BCCI's overall presence in the UK.
- (iv) On or about 11 May 1990, BCCI's solicitors made contact with ACAS with a view to obtaining their services in respect of the imminent dismissals and sent to BIFU a copy of the memoranda sent to staff.
- (v) Further information about voluntary and compulsory redundancy and the monies which would be paid to redundant employees was distributed to employees on 18, 22 and 25 May 1990, and on 25 May 1990 copies were sent to BIFU.
- (vi) On 29 May 1990 BIFU wrote to BCCI seeking improved terms for those volunteering for redundancy. On 6 June 1990 BCCI refused, but on 8 June 1990 announced scope for help to certain lower paid staff.
- (vii) The benefits which BCCI was proposing to confer on all those made redundant (irrespective of whether they signed an agreement) included: (a) payment for the statutory notice period; (b) statutory redundancy pay; (c) an *ex gratia* payment calculable by reference to length of service; (d) potential concessions and moratoria on secured loans.
- (viii) On 18 June 1990 letters of dismissal were sent out to a number of employees (including Mr Naeem) stating *inter alia*: (a) that BCCI was unable to continue their employment within the restructured organisation it proposed to retain in the UK; (b) that the letter was formal notice of termination by reason of redundancy and the termination date was 30 June 1990; (c) that in

addition to receiving full notice entitlement and statutory redundancy entitlement (and accrued holiday pay) BCCI would make an *ex gratia* payment; (d) that a Schedule was attached summarising the "package" offered; (e) that the employee should contact the Human Resources Department in the event of queries; (f) that BCCI was concerned that employees should have the opportunity of discussing the matter with ACAS and had arranged with ACAS for one or more of its conciliation officers to attend at BCCI; (g) that the employee could opt to receive a further one month's gross salary in addition to the total payment if willing to sign an agreement acknowledging that the payment received was in full and final settlement.

- (ix) The attached redundancy package calculation specified the sums payable and the amount of the additional payment (equivalent to one month's gross pay) which would be made if the individual signed the agreement. The attached form contained the request:

Please indicate below your decision concerning ACAS as all individuals taking up the increased offer will be required to sign the appropriate form in the presence of an official from ACAS.

- (x) The notice period was shorter than that to which Mr Naeem was entitled. He was entitled to 5 weeks notice, expiring on a date later than 4 July 1990. It is common ground that nonetheless the notice (whilst in breach of contract) was effective to determine his contract of employment.

- (xi) On 20 June 1990, Mr Naeem signed a redundancy package calculation form and indicated a wish for an interview with an officer of ACAS. On 20 June 1990 BCCI's solicitors discussed with ACAS their involvement. On 21 and 22 June 1990, meetings took place between BCCI, ACAS and BIFU finalising the terms as to payment and for the redundancy programme to go ahead.

- (xii) On 25 and 27 June 1990, memoranda were sent to all staff made redundant at the end of June inviting them to a meeting with ACAS on 4 July 1990 and confirming that a cheque for the basic package (i.e. excluding the extra payment for signing the agreement) could be collected on 29 June 1990. Together with the memorandum of 25 June 1990 was the "ACAS Statement" together with the agreement which they would be asked to sign. (There is a dispute of no significance as to whether it was received before the meeting or at the meeting). The ACAS Statement: (a) emphasised that ACAS was an "independent body" and "does not represent either the employer or trade union or employees"; (b) noted that the offer of the extra payment had been made in return for the employee giving up rights relating to possible claims in an Industrial Tribunal "or any other court"; (c) drew the employee's attention to the possibility of consulting a Citizen's Advice Bureau, trade union or solicitor before deciding whether or not to accept; (d) emphasised (in capital letters) that if the agreement were signed it would be legally

binding and the employee would not be able to change his mind afterwards; (e) emphasised (in capital letters) that the terms of the agreement were the responsibility of the parties, not ACAS; (f) emphasised (in capital letters) that the employee should make sure that he understood the agreement and was satisfied with it before he decided whether to accept; (g) set out the terms of the agreement; (h) referred to “the ‘COT5’ leaflet enclosed”. This was a further pamphlet provided with the ACAS Statement about ACAS and its role, reiterating points in the ACAS Statement.

- (xiii) It was clearly established by the evidence of Mr Curry (the Senior Executive Officer of ACAS involved in this redundancy in 1990) that to the best of his knowledge ACAS maintained its independent role on this assignment; and that while this role required ACAS to act as a conduit for information it was requested to pass between BCCI and BIFU and employees and (if requested) to express a view whether an employer's offer met the statutory minimum redundancy payment, it did not permit ACAS to give advice to an employee whether to accept a payment in settlement of all claims or whether the offer was a good one. It was also established by the evidence of Mr. Munn (the Assistant Personnel Manager of BCCI) that BCCI respected the independence of ACAS and its role and took all necessary steps to ensure that this role was performed without any interference from BCCI.
- (xiv) Mr. Naeem (and other employees) attended at Archery House on 4 July 1990. There was first a general address from an ACAS officer. Employees were then invited to have private and confidential interviews with one of five ACAS conciliation officers. Mr Naeem had such an interview. An Urdu speaker was available if needed to act as translator, although in the event he was not needed. The information given by the ACAS officers included the information that the redundancy package offered met the statutory entitlement to redundancy pay, which it did. The ACAS officer also confirmed that the employee would not receive the additional payment offered in return for signing the agreement unless he did in fact sign the agreement.
- (xv) Mr. Naeem (and other employees) duly signed their agreements and a representative from BCCI also signed.
- (xvi) In addition for signing the agreements, employees received the additional payment, equating to one month's gross pay, which in Mr Naeem's case was £2,772.50. Mr Naeem has not returned any of the payment made to him nor has he offered to do so. In paragraph 44 of the Statement of Claim it is merely stated that he would give credit against his own claim for so much of the sums he may receive "as the Court shall deem just and equitable in the circumstances".
- (xvii) Further meetings took place between ACAS and other redundant staff on 18 and 19 July 1990."

43. It is, I think, helpful to supplement that account by a more detailed description of the ACAS COT3 form signed by Mr Naeem on 4 July 1990 and the documents attached to that form (which he also signed on that day). It is necessary, also, to have in mind why BCCI required him to sign that form as a pre-condition to receiving the additional payment.

44. The COT3 form is headed "Advisory Conciliation and Arbitration Service". It is for use either (i) to record an "Agreement in respect of an application made to the Industrial Tribunal" or (ii) to record an "Agreement in respect of a request for conciliation made to the Advisory Conciliation & Arbitration Service (No application made to Tribunal at the time of Agreement)". In the present case no application had been made to an Industrial Tribunal; and this is reflected in the omission from the form of a Tribunal case number. The form provides space for the inclusion of the names and addresses of the "Applicant" and the "Respondent". The names and addresses of Mr Naeem and BCCI were set out in the space provided. Immediately below their names and addresses there is printed the sentence: "Settlement reached as a result of conciliation action". Immediately below that there is printed: "We the undersigned have agreed". The terms of the agreement are then set out, in typescript as an addition to the printed form. I have already referred to those terms earlier in this judgment; but it is relevant to have in mind that they begin with the words "The Applicant agrees to accept the terms set out in the documents attached . . ." The documents attached to the COT3 form are an integral part of the agreement. The COT3 form ends with the signature of Mr Naeem, a signature on behalf of BCCI authenticated by its "chop" or stamp, and with the same date (4/7/90) against both signatures.

45. There appear to have been two documents attached to the COT3 form. Each is signed by Mr Naeem and dated 4 July 1990. The first is headed "Redundancy Package Calculation". It is, I think, a copy of the schedule sent to him on 18 June 1990 with his dismissal notice and first signed by him on 20 June 1990 as described by Mr Justice Lightman at sub-paragraph 3(xi) of his judgment. There are set out in the Redundancy Package Calculation the name of the employee, his date of birth, the date his service with BCCI commenced, the termination date, the years of service, his basic salary and allowances, his gross annual salary and the monthly and weekly equivalents of that gross annual salary. Below that information there is a section headed "Computation of Package". It is convenient to set that section out in full:

1.	STATUTORY REDUNDANCY PAY	
	7.5 weeks at £184.00	£1,380.00
2.	EX-GRATIA PAYMENT	
	4 weeks at £639.81	£2,559.24
	12 months Mortgage Subsidy	£ 0.00
	<u>TOTAL FOR BASIC PACKAGE</u>	<u>£3,939.24</u>
3.	ADDITIONAL PAYMENT ON SIGNING	
	ACAS FORM COT3	£2,772.50
	<u>TOTAL FOR ENHANCED PACKAGE</u>	<u>£6,711.74</u>
4.	CONTRACTUAL NOTICE PERIOD:	
	5 weeks at £639.81	£3,199.05

46. The other document attached to the COT3 form is headed "Redundancy Disbursements". There are set out in this document, also, the name of the employee, the particulars of his service, his gross annual salary and the monthly and weekly equivalents of that gross annual salary. There follows a section headed "Immediate Disbursement":

IMMEDIATE DISBURSEMENT	
4 weeks at £639.81	£2,559.24
12 months Mortgage Subsidy	£ 0.00
2 weeks notice actually given	£1,279.62
(converted to Ex Gratia payment)	<u> </u>
TOTAL EX GRATIA PAYMENT	£3,838.86
SET OFFS	<u>£ 0.00</u>
	£3,838.86
STATUTORY REDUNDANCY PAY	£1,380.00
CHEQUE ENCLOSED	£5,218.86

47. That section of the Redundancy Disbursements schedule concluded with the word "Received"; and with Mr Naeem's signature. There is no date. It may be that that first section was signed on 29 June 1990 when, as Mr Justice Lightman pointed out at paragraph 3(xii) of his judgment, a cheque for the basic package was to be available for collection. It may be that it was

not signed until 4 July 1990. Nothing turns on that. The next section of the schedule was headed "Possible Further Disbursement":

POSSIBLE FURTHER DISBURSEMENT

Upon return of signed ACAS form COT3	£2,772.50
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48. That section also ends with the word "Received", against which Mr Naeem put his signature and the date (4/7/90). The third section provides for a future disbursement in lieu of contractual notice:

FUTURE DISBURSEMENT

Via July Payroll:

3 weeks payment in lieu of contractual notice	£1,919.43
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July payroll will also include any adjustment in respect of under/over availed holiday entitlement

49. The documents show, therefore, that Mr Naeem was to receive – and, on the assumption that the payment of three weeks salary was made through the July payroll, did receive – a total of £9,910.79 on the termination of his employment, comprising (i) £1,380 in respect of statutory redundancy pay, (ii) £3,199.05 in respect of the five weeks contractual notice to which he was entitled, (iii) £2,559.24 as an ex gratia payment, and (iv) a further £2,772.50 in consideration for signing the COT3 form. He received that total amount in three instalments: (a) by a cheque payment of £5,218.86 on or about 29 June 1990, (b) by a further payment of £2,772.50 on signing the COT3 form on 4 July 1990 and (c) as to the balance, £1,919.43, through the July payroll. It is important to keep in mind that he would have received the payments under (a) and (c) a total of £7138.29, representing the sum of items (i), (ii) and (iii), whether or not he had signed the COT3 form.

50. What, then, was the importance to BCCI of obtaining the employee's signature to the COT3 form? The answer lies in section 140 of the Employment Protection (Consolidation) Act 1978 – now replaced by section 203 of the Employment Rights Act 1996. Section 140(1) of the 1978 Act provided that, except as provided in sub-section (2), any provision in an agreement (whether a contract of employment or not) should be void in so far as it purported (a) to exclude or limit the operation of any provision of that Act or (b) to preclude any person from presenting a

complaint to, or bringing any proceedings under that Act before, an industrial tribunal. Section 140(2) is in these terms, so far as material:

“140(2) Subsection (1) shall not apply –

(d) to any agreement to refrain from presenting a complaint under section 67, where in compliance with a request under section 134(3) a conciliation officer has taken action in accordance with that subsection;

(g) to any agreement to refrain from instituting or continuing any proceedings before an industrial tribunal where a conciliation officer has taken action in accordance with section 133(2) or (3); . . .”

51. Section 67 of the 1978 Act enabled an employee to present to an industrial tribunal a complaint that he had been unfairly dismissed. Section 134(3) applied where an employee claimed that action had been taken in respect of which a complaint could be presented by him under section 67 and, before any complaint relating to that action had been so presented by him, a request was made to a conciliation officer by either the employee or the employer. In such a case, the conciliation officer was required to endeavour to promote a settlement of the complaint without it being determined by an industrial tribunal. Section 133(3) imposed a similar duty on a conciliation officer where request was made in relation to complaints arising out of alleged contravention of other provisions in the 1978 Act or in other employment legislation. A conciliation officer, in that context, meant an officer of the Advisory, Conciliation and Arbitration Service designated to perform the functions of a conciliation officer in respect of matters which are or could be the subject of proceedings before an industrial tribunal – see section 2(4) of the Employment Act 1975.

52. The advantage, therefore, to an employer of an agreement recorded on an ACAS COT3 form was that the use of the form evidenced the involvement of a conciliation officer in the promotion of the settlement of the complaint to which the agreement related. The involvement of the conciliation officer took the agreement outside the avoidance provisions in section 140(1); and so enabled the employer to rely upon it in any future litigation, whether before an industrial tribunal or elsewhere; notwithstanding that its provisions (on their face) excluded or limited the

operation of the 1978 Act. It was for that advantage that BCCI was prepared to pay an additional sum equal to one month's gross salary to those employees who would sign the COT3 form.

53. That objective is, in part, reflected in the words of the settlement agreement itself:

“... in particular, all or any claims rights or applications of whatsoever nature that the Applicant has or may have or has made or could make in or to the Industrial Tribunal ...”

It is plain that, at the least, the agreement was intended to preclude the employee from presenting a complaint to, or bringing any proceedings under the 1978 Act before, an industrial tribunal. The employee must have understood that. The use of the ACAS COT3 form achieved that objective. But, beyond its importance in relation to the avoidance provisions in section 140(1) of the 1978 Act, the use of the ACAS form – rather than any other document to record the agreement – seems to me to have no relevance. I reject the contention, in paragraph 19 of the statement of claim of 4 September 1998, that, as a matter of construction, the agreement was intended only to compromise the claims for statutory redundancy pay, wages in lieu of notice and unfair dismissal – claims which could have been made in an industrial tribunal.

54. I reject that contention because it is clear that both the employer and the employees must be taken to have intended that the agreement should apply to claims other than claims which could be made in an industrial tribunal. If that were not their intention the general words:

“... all or any claims whether under statute, Common Law or in Equity of whatsoever nature that exist or may exist ...”

would serve no purpose. The whole objective would be achieved by the particular words which follow – and which I have set out above. It is plain, I think, that (at the least) the parties intended that the agreement should apply to claims for damages for breach of the contract of employment. It is pertinent to have in mind that, at the relevant time, claims for damages for breach of a contract of employment (other than in respect of non-payment of wages) could not be brought in an industrial tribunal; no order had been made under the powers then contained in section 131(1) of the 1978 Act.

55. The problem for the employee in the present case is that it is clear that those general words are apt, as a matter of language, to include the stigma claims which employees now wish to pursue. Those claims – on any view – are claims which (as at the date of the agreement, 4 July 1990) exist or may exist at common law. That is because the claims are in respect of a breach of the employment contract which, if it occurred at all, occurred before the contract determined on 30 June 1990. It is immaterial, in relation to those contractual claims, that the loss in respect of which the employee claims damages did not arise until sometime later, if at all.

56. The first issue on this appeal is whether the court should construe the general words used so as to include the stigma claims. The second issue is whether, if that is the effect of those words as a matter of construction, the court should allow BCCI to rely upon a construction which has that effect. Those issues arise in a factual context in which (i) BCCI must be treated as having knowledge at the relevant time that it was engaged in a dishonest and corrupt business – that is accepted for the purposes of the ACAS COT-3 issue, (ii) Mr Naeem must be treated as not having that knowledge at the relevant time – that, also is accepted for the purposes of the issue, (iii) it was a necessary incident of the way in which BCCI was carrying on its business that the dishonest and corrupt nature of that business should be concealed from the general body of employees, including Mr Naeem, (iv) BCCI must be taken to have known that Mr Naeem did not have that knowledge at the relevant time – it was BCCI's intention to conceal the dishonest and corrupt nature of its business from the general body of its employees and there was no reason to think that it had not achieved that objective, (v) without that knowledge Mr Naeem could not have appreciated that there had been a breach of the implied term on which the stigma claim is founded, and (vi) the possibility that BCCI – a bank authorised by the Bank of England under the Banking Act 1987 to carry on banking business in London – would be carrying on a dishonest and corrupt business was so remote that Mr Naeem could not be expected to appreciate that it might exist, or that BCCI might be in breach of its obligation not to abuse the trust and confidence which he was entitled to place in it as his employer.

57. In approaching both issues identified above it is important to appreciate that, although expressed in the language of compromise – “The Applicant agrees to accept the terms set out in the documents attached in full and final settlement . . .” - the true purpose of the agreement recorded on the COT3 form was not to compromise identified claims but to release BCCI from

unidentified claims. The documents attached to the COT3 form - which I have described in some detail - make that clear. The identifiable claims, in respect of redundancy and inadequate notice, were identified and paid in full. There was no compromise of those claims; they were acknowledged and met. There was no obvious basis for an unfair dismissal claim; BCCI and its solicitors had been scrupulous in pursuing consultations with BIFU and the employees; the procedure set out to be fair and it has not been suggested that there was not, in fact, a redundancy situation. But, in so far as it could have been said that the dismissal was unfair, BCCI had taken the precaution of including in the basic package a substantial ex gratia payment and (for those with secured loans) a twelve month mortgage moratorium and subsidy. The additional payment for the employee's signature to the COT3 form was not offered in order to compromise identified claims. That payment was offered in order to persuade the employee to sign a document which had two features: (i) it contained a general release in the widest terms of unidentified claims and (ii) the document itself was in a form which would be relied upon in future litigation. It is appropriate, therefore to approach the construction of the agreement on the basis that it was intended to effect a release for the benefit of BCCI; and with the principles applicable to the construction and effect of such documents in mind.

58. The principles applicable to the construction of a release are conveniently summarised in *Chitty on Contracts* (28 Edition, 1999, page 1146) at paragraph 23-005:

"The normal rules relating to the construction of a written contract also apply to a release, and so that a release in general terms is to be construed according to the particular purpose for which it is made. The court will construe a release which is general in its terms in the light of the circumstances existing at the time of its execution, and with reference to its context and recitals, in order to give effect to the intention of the party by whom it was executed. In particular, it will not be construed as applying to facts of which the party making the release had no knowledge at the time of its execution or to objects which must then have been outside his contemplation. But the construction of any individual release will necessarily depend upon its particular wording and phraseology."

59. In support of the proposition that a release will not be construed as applying to facts of which the party making the release had no knowledge at the time of its execution, the editors of *Chitty* cite the decision of Sir Richard Malins, Vice-Chancellor, in *Ecclesiastical Commissioners for England v North Eastern Railway Co.* (1877) 4 ChD 845. The plaintiff's claim was in trespass, for the wrongful extraction of coal in 1863 by the defendant from beneath land of which

the plaintiffs were owners. The boundaries between the plaintiff's mine and the defendant's mine had been settled in 1862 by reference to an agreed map; but it was not until 1864 that a formal agreement recording the settlement was executed. The agreement contained a term that "all claims on account of damage of every kind, and whether by trespass or otherwise by either party, be condoned and discharged from the signing of the agreement". The plaintiffs did not discover the trespass, of which they complained in the action, until 1870. The principal defence was that of limitation; to which the plaintiffs' reply was that they should be relieved from the effect of the statute of limitation on the grounds of the defendant's concealed fraud. They could not, with diligence, have discovered what the defendant was doing in its own mine. The judge held that the circumstances were such that the statute did not run against the plaintiffs until 1870, when they did discover what had happened. He said this, at page 866:

"... in 1863 this very land which they had acknowledged in 1862 to be part of the [plaintiff's] colliery was entered upon, the bounds broken, and the coal worked out from it, ... It is also proved that the fact of the coal having been so worked and the boundaries broken was unknown to the plaintiffs until 1870, and that there was no want of diligence on their part in not discovering it at an earlier period. I am of opinion that the statute begins to run on this subject from the time of the discovery ..."

60. In those circumstances it was, perhaps, not surprising that Sir Richard Malins, Vice-Chancellor, was not impressed by a defence based on the release. It is relevant to see how the argument was put by counsel for the plaintiffs, at page 850:

"Secondly, as to the release, even if it could be held to apply to our colliery so that all wrongful acts done up to the time the release was signed were condoned, yet that necessarily referred only to the settlement come to between the parties in 1862. Up to that period none of our coal had been taken, and after the boundaries had been readjusted and a new map drawn out and settled, the Plaintiffs could not have supposed that while the negotiations were going on the Defendants had been violating the terms of the agreement, and had, in 1863 taken away the coal. All this was unknown to the Plaintiffs, and was not, in fact, discovered till 1870; therefore the release could not operate upon these intermediate acts of the Defendants."

61. The judge dealt with the point shortly, at page 853. He said this:

"It may, I think, be assumed that all questions which had arisen up to 11th of May, 1864, when the agreement was signed between the owners of the adjoining collieries, were then settled, and if the Plaintiffs had notice that the coal ... had then been worked, I should have been of opinion that this suit could not have been sustained, because it would have shown distinct knowledge at that time: and although it is not in terms a release, yet,

looking at the correspondence and all that passed, I think after the expiration of six years the Plaintiffs would have been barred from any right to sue for what had been done.”

62. For my part, I have some doubt whether the decision in *Ecclesiastical Commissioners for England v North Eastern Railway Co.* is authority for the wide proposition for which it is cited in *Chitty* – that no release will not be construed as applying to facts of which the party making the release had no knowledge at the time of its execution. I think that, on the particular facts of that case, the decision was that the parties could not have intended that, by signing the agreement in 1864, the plaintiffs were condoning wrongful acts which had occurred after 1862 and about which they did not know and could not have discovered. The plaintiffs were led to think that there had been no acts of trespass after 1862, when the common boundary was agreed. It is not without some significance, in the present context, that the acts in relation to which the defendant sought to place reliance on the release were acts of which the defendant had knowledge at the relevant time but which it had (in effect) concealed from the plaintiffs.

63. In support of the proposition that a release will not be construed as applying to objects which must, at the time of execution, have been outside the contemplation of the party making it, the editors of *Chitty* cite *Payler v Homersham* (1815) 4 M&S 423, *Lyall v Edwards* (1861) 6 H&N 337, *Re Armitage* (1877) 5 ChD 46, *Turner v Turner* (1880) 14 ChD 829, *Re Perkins* [1898] 2 Ch 182, and *Re Joint Stock Trust Corporation* (1912) 56 Sol J 272. The principle is not in doubt; but, of the cases cited, it is only *Lyall v Edwards* that provides any real assistance in the present appeal. It is convenient to examine the other cases before turning to *Lyall v Edwards*.

64. *Payler and others v Homersham* (1815) 4 Maule & Selwyn 423 (105 ER 890) was decided on the grounds that the general words of a release may be controlled by the recitals – see the judgment of Lord Ellenborough, Chief Justice, (with whom Mr Justice Bayley agreed) at pages 426-7. In that case it was clear from the recitals to the deed of composition and release executed by the plaintiffs as creditors of the defendant, an insolvent debtor, that monies due from the defendant under a bond given to the plaintiffs as security for the repayment of bills drawn on them by the defendant, with others, were not intended to be within it; and so were not within the very wide words of general release which the deed contained. The decision is not, I think, of any assistance in the present case.

65. *In re Perkins* [1898] 2 Ch 182 is another example of the application of the same principle – see the observations of Sir Nathaniel Lindley, Master of the Rolls, at page 190:

“General words of release are always controlled by recitals and context which shew that, unless the general words are restricted, the object and purpose of the document in which they occur must necessarily be frustrated. General words are always construed so as to give effect to, and not so as to destroy, the expressed intentions of those who use them. Good illustrations of this principle will be found in *Payler v Homersham* and *Lindo v Lindo*.”

66. *Ex parte Good, In re Armitage* (1877) 5 ChD 46, is example of general words of release being controlled by the circumstances. Those circumstances showed that the release, in the form of a receipt, had been given for the purpose of compromising a particular claim by a bank against one, John Smythies, whom the bank alleged was partner with John Armitage in a partnership, John Armitage & Co. The release was of “all claims against him [Smythies] in reference to or in connection with John Armitage & Co”. It was held, perhaps not surprisingly, that that did not preclude the bank from proving in the bankruptcy of Armitage. Again, the decision is of no assistance in the present case.

67. In *Turner v Turner* (1880) 14 ChD 829 the release was given to the defendant, as executrix of her late husband, in the context of a compromise of a threatened challenge to the validity of the will by some of the children (themselves beneficiaries under the will). The effect of the compromise was that the defendant proved the will, but distributed the estate in a manner more favourable to the children than would have been the case in a due course of administration. The compromise agreement, by deed dated 3 July 1868, contained a general release of the children's claims against the widow in the widest terms. The testator was entitled to a share in the estate of his kinsman, J W M Turner RA, who had predeceased him. Certain of the artists plates, pictures and engravings had been sold in 1858 for £2,500. In 1873 the executrix learnt of the resale of that property at the price of £40,000. She brought proceedings to set aside the sale in 1858. In 1877 she obtained a decree that the sale was not binding on her late husband's estate; and recovered some £9,000 or thereabouts. Two of the children claimed a share in that money. She set up the 1868 release as a defence to those claims. Sir Richard Malins, Vice-Chancellor, held that she could not rely upon it. He said this, at page 833:

"It is to my mind impossible to read this deed without seeing that it is addressed to the state of things and to the amount of property of which the parties were aware, and that it has no application and could have no application to property of the existence of which they were unaware. It is an arrangement with regard to a state of things then known; but as to these engravings and the setting aside of the sale, it was impossible that it could apply to them. In a case of this kind it is the duty of the court to construe the instrument according to the knowledge of the parties at the time, and according to what they intended, and not extend it to property which was not intended to be comprised within it. There was no intention to assign to the widow any property which might otherwise accrue to the testator's estate, or property which was not known. So far from that being the case, it is clear that the deed was only intended to apply to property the existence of which they were then aware of."

68. In *Re Joint Stock Trust and Finance Corporation* Mr Justice Swinfen Eady applied *Lyall v Edwards*, when holding that the respondent, Mr Horatio Bottomley, could not rely on a deed of mutual release as a defence to a claim in misfeasance by his company; but the report is too abridged to be of any help as to the circumstances in which the deed was executed (save that they were highly suspicious).

69. I turn, therefore, to the decision of the Court of Exchequer in *Lyall and another v Edwards and Matthie* (1861) 6 Hurlstone and Norman 337 (158 ER 139). The plaintiffs brought an action against the defendants in trover in respect of indigo warrants. The defendants set up, by way of defence, a release by deed from all causes of action. The plaintiffs entered a replication on equitable grounds. They averred that they had executed the deed in connection with the liquidation of the affairs of the defendants, in which they were creditors. By the deed they had released the defendants "from all and all manner of actions, cause of action and suit, bills, bonds, writings, obligations, debts &c., claims and demands whatsoever both at law and in equity, or otherwise howsoever". They averred that, at the time when they executed the deed, and without default on their part, they did not know that the defendants had committed the acts or grievances now complained of in relation to the indigo warrants, or that they had any claim or cause of action against the defendants in relation to those warrants; further, that at the time the deed was executed, "the defendants did then know that they had committed the said grievances, and that the plaintiffs had a claim or cause of action against them in respect of the said goods, but did not inform the plaintiffs thereof before the execution of the said indenture". The plaintiffs averred that they executed the release believing and intending that would relate only to the sum of money for

which the defendants were then indebted to the plaintiffs and intending to release only that debt. It is, I think, of interest to note the way in which the point was put by the plaintiffs' counsel:

"The question is whether the defendant is in equity entitled to say that the release extends to claims not in the contemplation of the parties at the time it was executed. The indenture is an ordinary deed for winding up the affairs of a co-trading partnership under the direction of inspectors, and if it had contained a schedule, with the amount of the respective debts set opposite the names of the creditors, there could have been no question as to its limit."

70. If the deed had, indeed, contained a schedule showing the amount of debt against the name of each creditor, the position would, I think, have been indistinguishable from that in *Payler v Homersham*, to which I have already referred.

71. The issue came before the court on demurrer. It was held that the plaintiffs' replication was good. Chief Baron Pollock said this, at page 347 (158 ER 139, 143):

"It is a principle long sanctioned in Courts of equity, that a release cannot apply, or be intended to apply to circumstances of which a party had no knowledge at the time he executed it, and that if it is so general in its terms as to include matters never contemplated, the party will be entitled to relief. Here the replication sets out sufficient to show that the plaintiffs are not bound by the release quoad the circumstances mentioned; "

72. The other members of the court, Baron Martin and Baron Wilde, agreed with the Chief Baron. Baron Martin said this, at pages 347-8 (158 ER 139, 144):

"The replication is founded on the equitable doctrine that if a release is given for a particular purpose, and it is understood by the parties that its operation is to be limited to that purpose, but it turns out that the terms of the release are more extensive than was intended, a Court of equity will interfere and confine it to that which was in the contemplation of the parties at the time it was executed. The case of *Farewell v Cocker* (2 Meriv 171), which has been referred to, is an authority for that position. Here we are required to call in aid the rule in equity. The substance of the replication is that the act of conversion committed by the defendants was not within the meaning of the release. . . . It seems to me that the facts stated in the replication shew that the release was only intended to apply to such claims as ordinary debts, and not to a claim for conversion."

73. Baron Wilde put the point in these words, at page 348:

"I am of the same opinion. The doctrine of a Court of equity is that a release shall not be construed as applying to something of which the party executing it was ignorant, and we have now to act on that doctrine in a Court of law."

74. *Farewell v Coker* (Reg. Lib. 1726, A fo. 197), to which Baron Martin referred, was decided by Lord Chancellor King some 135 years earlier. It is cited with approval by Sir William Grant, Master of the Rolls, in *Cholmondeley v Clinton* (1817) 2 Merivale 171, at page 353 (35 ER 905, 973-4) where the facts are set out. It appears from Sir William Grant's judgment that Lord King's decision was upheld in the House of Lords. Sir William Grant clearly treated the decision as authority for the proposition that the execution by a daughter, who was unaware that she was entitled under the will of her father to an interest in fee in remainder on her brother's interest in tail, of a general release in favour of her brother would not carry the interest of which she was ignorant; notwithstanding that the words of the release were plainly apt to do so.

75. It is not wholly clear - at least, not wholly clear to me - whether the true basis of the decision in *Lyall v Edwards* is that, as matter of construction, the clear words of the release could not be given the construction that they would otherwise bear because the releasor could not have intended to release a claim of which he was ignorant (as Baron Wilde seems to have thought); or whether the true basis of the decision is that the releasee was prevented in equity from taking advantage of the clear words of the release on the grounds that it would be unconscionable for him to do so. The latter was, I think, the view taken by Chief Baron Pollock ("if [the release] is so general in its terms as to include matters never contemplated, the party will be entitled to relief") and by Baron Martin ("but [if] it turns out that the terms of the release are more extensive than was intended, a Court of equity will interfere and confine it to that which was in the contemplation of the parties at the time it was executed"). If the latter is the true analysis, then it is plainly material, in relation to a consideration of unconscionability, that the releasee knew of the claim and did not inform the releasor of it - as was the pleaded case in *Lyall v Edwards* itself; and, equally, material that the releasee knew of the relevant facts, knew that the releasor did not know those facts (because the releasor intended to conceal them from him), and did not disclose those facts.

76. In each of the cases cited there was a context which showed what the claim or claims were which the parties intended to release. In *Ecclesiastical Commissioners for England v North*

Eastern Railway Co (1877) 4 ChD 845 the relevant claims were those which had arisen before the date at which the common boundary had been agreed. In *Payler v Homersham* (1815) 4 M&S 423 – and, I think, in *Lyall v Edwards* (1861) 6 H&N 337 – the claims were those in respect of which the creditor was to receive some distribution out of the insolvent's estate. In *Turner v Turner* (1880) 14 ChD 829 the claims were those of beneficiaries under an earlier will or intestacy. The court was able to hold, in each case, that the release was not intended to extend to unidentified claims.

77. The difference, in the present case, is that the identifiable claims were identified and met in full. As I have pointed out, the purpose of the release in the present case was not to release identified claims which had been the subject of a compromise or composition. It was to release unidentified claims in respect of which there had been no composition or compromise – because they had not been identified. For my part I find it impossible to hold that, as matter of construction, the employee did not intend the release in the present case to apply to unidentified claims. For the reasons which I have already set out it seems to me that was so plainly the purpose of the agreement that no other interpretation is open to the court.

78. I accept, of course, that Mr Naeem and his fellow employees did not appreciate that they had claims for stigma damages at the time that they signed the agreements. Indeed, there is no reason to think that BCCI appreciated that there were claims for stigma damages until the law was revealed the House of Lords in 1997 – although BCCI knew the underlying facts which gave rise to those claims. But the feature of unidentified claims is that they are unidentified. A release of unidentified claims is a release of claims which the releasor does not know that he has. I find an insuperable illogicality in the proposition that a general release of unidentified claims can extend to some unidentified claims and not to others. Nor can that difficulty be overcome, in the present case, by confining the unidentified claims to claims of a specific class; or by excluding claims of a specific class – for example, by excluding personal injury claims. It is impossible to exclude from the class of unidentified claims, claims in respect of breach of the employment contract; it is plain that, whatever else might have been outside the contemplation of the parties, claims in respect of breach of the employment contract were within their contemplation. And it is impossible to exclude from that class claims of which the employee was unaware; unidentified claims are claims of which the parties are unaware.

79. For that reason, I am not persuaded that this appeal should be allowed on the ground that Mr Naeem never intended that the agreement which he signed should operate to release claims that he did not know that he had.

80. But I am satisfied that the appellant is entitled to succeed on the second issue – that, if (as I would hold) the effect of the words of release, as a matter of construction, is to include the stigma claims, the court should not allow BCCI to rely upon a construction which has that effect. That a court of equity has power, in proper circumstances, to give relief from the unintended effect of the words used is, to my mind, the true analysis of the decision in *Lyall v Edwards*; namely, that in the circumstances before the court it would be unconscionable for the releasee to rely on the words of general release. A further example of the exercise of that power, although in a different factual context, can be seen in *Taylor's Fashions Limited v Victoria Trustees Co Ltd* (1979), reported as a Note at [1982] QB 133.

81. I would hold that, where (i) the releasee, say A, knows of facts which give rise to a claim (whether or not he believes that claim to be well founded as a matter of law), (ii) A deliberately conceals those facts from the releasor, say B, in circumstances where A knows or believes that B cannot discover them for himself, and (iii) B does not know of those facts, then A cannot rely on a general release from B as a defence to a claim based on those facts, notwithstanding that, as a matter of construction the words of the release would include all unidentified claims. A cannot rely on the general release because, in the circumstances described, it would be unconscionable for him to do so. On the basis of the assumptions of fact which we have been invited to make, those circumstances exist in the present case.

82. On that ground, I would allow this appeal.

Buxton LJ:

83. I agree that this appeal should be allowed. Since my reasons for so concluding may differ in some respects from those that attract both Chadwick LJ and the Vice-Chancellor (whose judgments I have had the advantage of reading in draft), I venture to add some brief words of my own.

Orthodox construction

84. I have no doubt that that BCCI as the profferror of the form of agreement inscribed on ACAS form COT3 intended the agreement to draw a line under any and all claims arising out of the employment relationship, whether past or future, known or unknown, and of whatever legal nature. And the words used are, in their natural meaning, apt to achieve that end. I agree with the contention of Mr Jeans that it is very difficult to think what else needed to be or sensibly could be said in the agreement to express the comprehensive and final nature of the settlement that BCCI plainly sought.

85. In those circumstances, I cannot agree that the ignorance of the employee of his potential stigma claim would serve, as a matter of orthodox construction, to cause COT3 to be interpreted as not applying to such a claim. For my part I do not find it necessary, nor particularly helpful, to apply to this case the literal terms of the principle stated by Lord Hoffmann in the *West Bromwich* case, which is cited by the Vice-Chancellor at paragraph 8 of his judgment. This is not a case where, when reading the meaning of the words used in the contract, one would conclude that something must have gone wrong with the language, or that the meaning of the words produces a conclusion that flouts business common sense. It is therefore artificial to require the reasonable person interpreting the document to be equipped with the background knowledge which would reasonably have been available to the parties in the situation in which they were in at the time of the contract. All that the reasonable person needs to know to understand the meaning of the document is available to him in the foreground, in the document itself.

86. But if it is necessary, and permissible, to go beyond the confines of the document itself, the situation in which the parties found themselves at the time of the contract was that set out in the first paragraph of this judgment. That situation was addressed, by the employer, by offering a contract of adhesion, unambiguous in its terms. That the employee by accepting the offer is to be taken to have agreed on the employer's terms, and thus to have adopted BCCI's intention, when he signed the document, is not an issue of the meaning of the words of the contract, but rather a demonstration, however artificial it may be, of the doctrine of freedom of contract as it still persists in English contract law. It does not displace that conclusion to say that the employee did not know of the claim that he is now said to have released; or that he would not have contracted on those terms had he known of that claim; because the intention of the employer, and thus of the agreement, was to put an end to all claims, known and unknown, and it was that that the employee agreed to.

87. Thus far, therefore, I agree with the approach to construction adopted by Lightman J; that as I understand it being the view on this point also of Chadwick LJ. I am not able to agree with the conclusion of the Vice-Chancellor in the first part of paragraph 34 of his judgment.

Is there a special rule in the case of releases?

88. My Lords have described the difficulties in interpreting the cases that have dealt with releases. I do not repeat their account in detail, but venture to make a number of observations.

1. A number of the cases in which general words of release have been held not to release unknown claims have proceeded on normal principles of construction. That was so in *Turner v Turner* (1880) 14 Ch D 829 and the two cases there relied on by Malins V-C, *Lindo v Lindo* and *LSWR v Blackmore*, where the deed was ostensibly and by its recitals intended to settle particular and identified disputes, a presumption not to be displaced by the addition at its end of a very wide purported release. And as Chadwick LJ points out, the same principle is stated by Lord Ellenborough CJ in *Payler v Homersham* (1815) 4 M & S 423, and by Lindley MR in *In re Perkins* [1898] 2 Ch 182, in the passage cited by the Vice-Chancellor at paragraph 15 of his judgment. But that approach would not seem to be available in our case, since in form COT3 there is no such express limitation of subject-matter, and every reason to think that one of the parties intended no limitation at all.

2. However, it is apparent at least from *Lyall v Edwards* 6 H&N 337 that a further rule applies in this case; because this is not an ordinary contract, since it operates as a release on the part of the employees, as it was intended by the employer so to do. The authorities on the construction of releases are almost all directed at releases by deed: where it is natural to look at what the party executing the deed intended by it, in the light of the circumstances contemplated by him at the time. That appears from *Lyall v Edwards*, where in the judgments of Pollock CB and Wilde B it was emphasised that a document relied on as a release must be read in the light of the knowledge of the releasor who executes it; and from *Farewell v Coker* 2 Meriv.353, cited in that case.

3. This, as expressed by Pollock CB and Wilde B in the passages already cited by Chadwick LJ, appears to be a special rule of construction applicable to releases. The approach of Martin B, on the

other hand, although claiming to be an expression of equitable doctrine, goes no further than to confine general words to what was in the contemplation of the *parties* (and not just of the releasor) at the time of making the contract. As such it is, as the Vice-Chancellor says, no more than a commonplace rule of construction.

4. Any special rule applying to releases cannot, however, be a rule of equitable *construction* because, as the Vice-Chancellor points out, there is no such thing. Rather, it appears to be a more general principle that equity will not permit general words in a release to debar the party using them from asserting claims that arise from circumstances of which he had no knowledge and matters that he did not contemplate (to pick up the language used by Pollock CB in *Lyall v Edwards* at p347).

5. So stated, the rule is a narrow one. It looks at states of affairs and general areas of liability that the releasor may be reasonably taken to have had in mind, rather than at specific claims. Applying that principle to the present case, I would hold that, on the assumption that at the date of the release Mr Naeem was unaware of the conduct of BCCI on which a claim for stigma damages might be based, the release cannot be applied to that claim. Those facts were entirely outside what Mr Naeem might be expected to have contemplated as the subject-matter to which his release was directed. The same conclusion would not follow in respect of facts that, although not actually known at the time of the release, fell within a recognised category of employment claims: for instance, an asbestosis claim by a worker in an industry where such claims were common. Nor would it follow in respect of facts not known but reasonably to be suspected.

6. I also incline to think that a release has to be taken to extend to facts known to or reasonably to be suspected by the releasor, but which he wrongly, as events proved, thought not to give him a claim in law. Thus, since stigma damages became available not by a statutory change in the law, but by the operation or development of the common law, it has to be accepted that the employees had a claim for stigma damages on the date that they signed the releases, in June 1990, even though it was not realised that that was the common law until June 1997.

7. Unlike my Lords, I do not think that the touchstone of the principle is unconscionability, save in the very general sense of unreasonableness; despite the reiterated claim in *Lyall v Edwards* that the principle is an equitable one. Counsel for the defendants in *Lyall v Edwards* indeed argued that

ignorance on the part of the releasor of the claim alleged to have been released should not suffice to offset the literal terms of the release, in the absence of unconscientious advantage taken by the beneficiary by the concealment of those facts. But that argument did not prevail in the appeal; the rejoinder, basing itself upon ignorance on the part of both parties, was held to be bad in law; and unconscionability was not relied on, or even mentioned, in any of the judgments. Thus, at least on the basis of *Lyall v Edwards*, concealment or deceit on the part of the beneficiary of the release does not seem to be any sort of condition precedent to the application of the rule as to releases; though I of course accept that, as the present cases demonstrates, that will often be a distinction without a difference, because the releasor's state of ignorance is most likely to stem from concealment or misleading behaviour on the part of the party released.

8. I accept that my view of the law entails that even in cases where the opposite party has not behaved unconscionably he cannot be wholly certain of the effect of a general release. But if the rule as to the effect of general releases is understood in the limited terms suggested in paragraph 5 above, it will only bite in comparatively unusual cases such as the present. In such cases, as in this case, that outcome does not seem to be in any way unfair as between the two parties.

A more general equity?

89. Because of my conclusion as to the role of unconscionability in addressing general releases there does not arise for consideration the proposition, relied on by my Lords, that the doctrine in *Lyall v Edwards* is related to the principle of equity identified in *Taylor Fashions*. I would merely venture to say that if, as the argument based on *Taylor Fashions* assumes, there had been an agreement between BCCI and Mr Naeem which on its true construction did extend to the claim for "stigma" damages; and there was no obligation on BCCI under the law of contract to disclose the facts on which such a claim might be based; then I have difficulty in thinking that equity can intervene on general grounds of unconscionability to discharge that agreement, or rather to limit its operation so as to exclude the stigma claim. While I respect the width of the statement of equitable principle that both of my Lords have quoted from the judgment of Oliver J in *Taylor Fashions*, I am not aware of any case in which the principle has been applied to a case of silence by one party to the formation of a contract. However, on the view that I take of the special circumstances of a release it is not necessary to decide that issue, and I would wish to reserve my opinion on it.